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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-862

JAMES HARRISON CAMPBELL, III,
Appellant,

v.

STATE OF GEORGIA,
Appellee.

MOTION TO AFFIRM

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The State of Georgia, by and through the Attorney General of the State of Georgia, moves this Court to affirm the judgment of the Georgia Court of Appeals in Campbell v. State, 139 Ga. App. 389, 228 S.E. 2d 309 (1976) in that the search of Appellant conducted by police officers was in no way violative of Appellant's rights under the Fourth Amendment to the United States Constitution; therefore, the issue is so insubstantial that no further argument is warranted and the judgment rendered by the Georgia Court of Appeals was correct.

STATEMENT OF FACTS

To properly assess the reasonableness of the search conducted, it is necessary to recount briefly the facts developed at trial and at the hearing on the motion to suppress prior to trial. Those facts show that on June 23, 1975, Detective Waddell of the Atlanta Narcotics Squad, upon a showing of probable cause based upon information from a confidential source, obtained a warrant to search the person and apartment of one "Tim (W/M)." (T. 410, Exhibit 1).[1] The informant, who, according to the detective, had been accurate and reliable on previous occasions, said that he had personally observed the use of and trafficking in cocaine at "Tim's" apartment and that the apartment was frequented by users of the drug cocaine; furthermore, cocaine was presently stored at the location. (T. 410, Exhibit 1).

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[1]T. refers to the trial transcript; M.T. refers to the motion transcript.

Armed with the search warrant, Detective Waddell, accompanied by several other officers, went to the apartment, there joining still other officers who had kept the apartment under surveillance for several hours. (M.T. 89-90). Just before the detective arrived, Appellant Campbell had entered the apartment (M.T. 153-54); on his person were approximately two ounces of cocaine in transparent plastic bags.[2] (T. 68).

Shortly after Appellant had entered, the detectives knocked on the rear door. (T. 26-27). Timothy Deuser, later identified as the "Tim" named in the warrant, raised the curtain covering the door's window and peered out. (T. 27). The officers identified themselves to Deuser; however, rather than admitting them pursuant to a valid search warrant Deuser took off back toward the living room where Appellant and a number of other persons were consummating a drug deal for the purchase of over $3,000 worth of cocaine. (T. 68-70).

Obviously fearing that Deuser or some of the others in the apartment were about to destroy the cocaine for which the warrant had been obtained authorizing the search, the officers forced their way in through the rear door. (T. 28). By the time they had entered, Deuser was halfway back to the living room where his "guests" were assembled. (T. 28). As the officers came in, Appellant fled, attempting to hide behind a television set.

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[2]As the search later disclosed, he also was carrying additional cocaine in a plastic vial in his pocket and two loaded revolvers concealed underneath his shirt.

(T. 29). All of the parties present were searched. Detective Waddell, who had spotted Appellant attempting to flee and duck behind the television, searched Appellant. (T. 25-26).

Appellant was leaned against the wall, braced with his hands. As Detective Waddell commenced the frisk of Appellant he felt a plastic bottle in Appellant's right pocket. The detective extracted the bottle and saw that it contained a white powdery substance. (M.T. 24-25, T. 25). Continuing the frisk, the detective discovered two pistols, one a .45 caliber and the other a .38 caliber, tucked inside the back of Appellant's trousers and concealed by the tail of his loose-hanging shirt (T. 25-26); both weapons were loaded and had cartridges in the chambers. (T. 26). While Detective Waddell was conducting his frisk search, Appellant had attempted to reach behind his back where he had concealed the loaded weapons. (M.T. 32).

The plastic bottle removed from Appellant's pocket was found to contain 3.1 grams of 35.7 percent pure cocaine. (T. 187).

ARGUMENT

I. THE EXCEPTIONS TO THE WARRANT REQUIREMENT WHICH ARE CONTAINED IN [1966] GA. LAWS 567, 570 [GA. CODE ANN. § 27-309] ADHERE TO FEDERAL CONSTITUTIONAL STANDARDS; HENCE, THE INSTANT SEARCH CARRIED OUT PURSUANT TO A WARRANT WAS NOT VIOLATIVE OF APPELLANT'S FOURTH AMENDMENT RIGHTS.

Appellant contends that [1966] Ga. Laws 567, 570 [Ga. Code Ann. § 27-309, hereinafter cited thus] is an unconstitutional extension of the warrantless search exceptions to the Fourth Amendment. Appellant's contention, as his interpretation of § 27-309, is ill-founded. Rather than carving additional exceptions to the warrant requirement, § 27-309 simply spells out the judicially recognized limitations on those exceptions.

Section 27-309 reads:

> "In the execution of the warrant the person executing the same may reasonably detain or search any person in the place at the time:
>
> (a) to protect himself from attack, or
> (b) to prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

The statute plainly authorizes the detention and search of a person not named in the warrant under which the search is being carried out in only two instances: (1) for the protection of those conducting the search and (2) to prevent the destruction or removal of items named in the warrant. The former is the typical case embraced by Terry v. Ohio, 392 U.S. 1 (1968); the latter was recognized in Johnson v. United States, 333 U.S. 10 (1947).

Indeed, the Georgia courts have so limited the applicability of § 27-309. In Wood v. State, 224 Ga. 121, 160 S.E. 2d 368 (1968), the court held that "§ 27-309 allows the search of persons not particularly described in the warrant only where the executing officer may reasonably believe that it is necessary (1) to protect himself from attack, or (2) to prevent the disposal or concealment of items particularly described in the warrant." Id. at 124, 160 S.E. 2d at 371.

Appellant's contention that § 27-309 dispenses with the necessity of a showing of probable cause is supported neither by the plain wording of the statute nor in the manner in which it has been interpreted and applied. Contrary to the assertions of Appellant, § 27-309 does not authorize routine searches of persons not specified in the warrant, it implicitly forbids them.

Additionally, before the warrant is issued, § 27-303 requires the officer seeking the warrant to state facts sufficient to show probable cause that a crime is being, or has been, committed and describe particularly the place, persons and things to be searched and seized. "It is only after these necessary requirements are met that the warrant may be issued and the search instituted. There is no merit in the contention that Code Ann. § 27-309 authorizes the search of persons without probable cause and without describing the articles to be seized." Wood v. State, 224 Ga. 121, 124, 160 S.E. 2d 368, 370 (1968).

Appellant contends that the "other persons" language contained in the warrant voided it ab initio as a general warrant. The Georgia Court of Appeals answered that argument by saying that the "language gives police no authority to search persons other than 'Tim' unless such search falls within the ambit of Code Ann. § 27-309." Campbell v. State, 139 Ga. App. 389, 391, 328 S.E. 2d 309, 311 (1976).[3]

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[3] In Commonwealth v. Smith, ___ Mass. ___, 348 N.E. 2d 101 (1976), the Supreme Judicial Court of Massachusetts upheld the validity of a search warrant authorizing the search of a named person and "'any person present who may be found to have . . . [heroin] in his possession or under his control or to whom such property may have been delivered . . . . " Id., 348 N.E. 2d at 102. The court commented that it was "virtually impossible to predict

(Footnote continued on next page)

Clearly, the warrant cannot issue initially absent a showing of probable cause; furthermore, during the execution of the warrant, persons not named therein can be searched only for the limited purposes of protecting the officers and preserving contraband or other specified items threatened with removal or destruction.

(Footnote 3 continued)
who would be there at a given time" and from the "asserted facts and fair inferences drawn therefrom, it was permissible to conclude that it was probable that any person in the apartment was a participant in the trafficking in heroin there." Id., 348 N.E. 2d at 106.

Observing that an "any person present" clause must be strictly scrutinized, the court set out several relevant facts to be used in assessing the validity of such a warrant: (1) the premises to be searched are confined and private, (2) the nature of the criminal activity makes it impossible to predict specifically what persons will be present at a given time, and (3) the items specified in the warrant are of a size or kind which renders them easily and likely to be concealed on the person. Id., 348 N.E. 2d at 107.

II. THE SEARCH OF APPELLANT WAS VALID UNDER THE FOURTH AMENDMENT IRRESPECTIVE OF THE APPLICABILITY OF [1966] GA. LAWS 567, 570 [GA. CODE ANN. § 27-309].

Section 27-309 clearly does not authorize unlimited searches of all persons present during the execution of a search warrant. However, assuming arguendo that the statute does allow searches less limited in scope than would be constitutionally permissible, the search of Appellant in the instant case was still a valid search.

As was said in Cooper v. California, 386 U.S. 58, 61 (1967), "the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." The facts disclose that it was. The officers arrived at the residence with a valid search warrant and with the knowledge that the apartment they were about to enter was used by illicit drug traffickers to buy and sell, as well as use, cocaine. While the apartment was under surveillance, the officers observed several persons entering and leaving. One of those who entered, Appellant Campbell, was recognized by Detective Burkhalter who was aware of Appellant's involvement in the illegal drug business. (M.T. 153)[4]

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[4]In response to a question from Appellant's lawyer, Detective Burkhalter stated that he "had known about Mr. Campbell for some time." (M.T. 88).

Upon knocking at the door and identifying themselves as police officers, the officers waited while Tim Deuser peered through the curtains masking the door's window, then bolted from the door in the direction of the occupants in the living room. As the police forced their entry through the rear door, the occupants fled; Appellant attempted to hide behind a television set but was noticed, apprehended and frisked by Detective Waddell. During this search, the detective felt a plastic bottle in Appellant's pocket. The resolution of the issue of whether or not the officer could properly retrieve the bottle from Appellant's pocket was stated succinctly by the Georgia Court of Appeals:

> "The record discloses that police found a small plastic bottle in the defendant's right pocket during the search. Whether or not that bottle could be removed from the defendant's pocket depended upon whether police reasonably believed that this bottle contained cocaine. The state presented evidence that they had observed several persons entering an apartment which they believed to be the situs of several cocaine sales, that 'Tim' would not open the door to permit their entry,

> and that the defendant and his companions had tried to hide from them when they entered. This evidence together with the knowledge that cocaine is frequently stored in small plastic bottles was sufficient to authorize police to remove and seize the bottle of white powder."

Campbell v. State, 139 Ga. App. 389, 391, 228 S.E. 2d 309, 312 (1976).

Appellant places his primary reliance upon dicta contained in United States v. Di Re, 332 U.S. 581 (1948). However, the Di Re case involved the search in a public place of a companion of one who the police had been informed was selling counterfeit gasoline ration coupons. The distinction was noted in United States v. Peep, 490 F. 2d 903 (8th Cir. 1974) where, similar to the present case, officers entered under a warrant to search for narcotics. While officers conducted the search, the defendant (not named in the warrant) entered the apartment. One officer noticed a bulge in the defendant's pocket which he patted to determine if it was a weapon. The bulge proved to be $3,800; a more thorough search revealed matchboxes containing narcotics. The court, citing Di Re, said "[i]t is important to distinguish the search in this case from the search of companions in a public place." Id at 906.

The present case is also similar to Peep in that both defendants attempted to evade the police. The defendant in Peep brushed aside the officer's hand when he attempted to pat down the bulge in his pocket; Appellant here attempted to run behind a television set. "'Deliberately furtive actions * * * at the approach of * * * law officers are strong indicia of mens rea * * *,' Sibron v. New York, [392 U.S. 40, 66, 88 (1968)]." Id.

Clearly, the officers conducting the search were confronted with a multitude of facts sufficient to provide probable cause that Appellant was concealing on his person cocaine in violation of the Georgia Controlled Substances Act; the officers were authorized to be in the apartment and, based upon the actions of Appellant, to detain and frisk him. The search of Appellant was valid under the Fourth Amendment as applicable to the states through the Fourteenth Amendment.

CONCLUSION

The search procedure challenged in this case did not violate any of the requirements of the Fourth Amendment. Neither does the language of Ga. Code Ann. § 27-309 circumvent constitutional safeguards nor attempt to do so. The search of persons not specified in a warrant is authorized only when the requisite probable cause is present in the form of protection of an officer or preservation of articles which are specified in the warrant.

For the foregoing reasons the judgment of the Georgia Court of Appeals in Campbell v. State, 139 Ga. App. 389, 228 S.E. 2d 309 (1976) should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for Appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served true and correct copies of this Motion to Affirm upon the Appellant's attorney by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. James A. McPherson
Attorney for Appellant
419 Carondelet Street
New Orleans, La. 70130

This _____ day of _____, 1977.

_____
JOHN C. WALDEN